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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

HILL-BEHAN LUMBER COMPANY, a Corporation, *Petitioner*,
vs.
STATE HIGHWAY COMMISSION OF MISSOURI, *Respondent*.

NO. 146.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

DANIEL C. ROGERS,
LOUIS V. STIGALL,
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State Highway Commission,
Jefferson City, Missouri,
Attorneys for Respondent.

Service of the within Brief in Opposition this day of July, 1941, is hereby acknowledged by counsel for the adverse party.

Attorneys for Petitioner.

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OPINIONS BELOW.

The opinion of the Supreme Court of Missouri (R. 293) is reported in 148 S. W. (2d) 499. It has not yet been officially reported.

JURISDICTIONAL GROUNDS.

The grounds on which Petitioner seeks to invoke the jurisdiction of this Court seem to be its contention that (1) this is a case arising under the "due process" or under the "equal protection" clauses of the Fourteenth Amendment of the United States Constitution (within the meaning of *Article III, Section 2, United States Constitution*), and (2) comes within this Court's appellate jurisdiction under the regulations made by Congress in *Title 28, U. S. C. A., Section 344, (b)*, authorizing certiorari for review of a final judgment by the highest court of a State where any title, right, privilege or immunity is specially set up or claimed by either party under the United States Constitution.

STATEMENT OF THE CASE.

The Supreme Court of Missouri (the court of last resort in Missouri) has held that the Petitioner has no right of recovery against the Respondent because of the construction in front of Petitioner's land of a viaduct on a state highway to eliminate a railroad grade crossing outside any municipal corporation.

The Respondent, State Highway Commission of Missouri, was created by a special law at an especially called meeting of the Missouri General Assembly in 1921.[1] It is not a corporation.[2] The Supreme Court of Missouri says the State Highway Commission of Missouri is "a subordinate branch of the executive department" of the State of Missouri.[3] Title to right-of-way for state highways is not held in the name of the Respondent nor are contracts for the construction of state highways made in the name of the Respondent, but in the name of the State of Missouri.[4]

The Petitioner is a Missouri corporation (R. 4-5, 40).

The Petitioner owns 26 acres of land in St. Louis County, Missouri (R. 5, 22). Immediately south of Petitioner's land is State Highway Route U. S. 61. Immediately east of Petitioner's land lie the Wabash railroad tracks. These tracks are used for main line and switching purposes by the Wabash and by the Terminal Railroad Association of St. Louis. Several switch tracks come inside of Petitioner's property from the northeast corner (R. 22, 23, 44, 288, 289). The Petitioner conducts a planing mill and retail and wholesale lumberyard on the land (R. 22, 28).

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[1]Laws of Missouri, First Extra Session, 1921, pp. 131 to 167, inclusive, approved by the Governor August 4, 1921, Chap. 46, Art. 13, (Secs. 8740-8787), R. S. Mo. 1939.

[2]Art. IV, Sec. 53, par. 25 of the *Missouri Constitution* provides: "The General Assembly shall not pass any local or special law: * * * (25) creating corporations, or amending, renewing, extending or explaining the charter thereof."

[3]*Bush v. State Highway Commission of Missouri*, 329 Mo. 843, 853-855, 46 S. W. (2d) 854 (1932).

[4]Sections 8759 and 8767, R. S. Mo. 1939.

The Missouri Public Service Commission of Missouri exclusively exercises the police powers of the State with reference to all crossings of public highways and railroads.[5] On June 7, 1934, the Public Service Commission of Missouri found:

> "A study of the facts indicates that a crossing at grade has become too hazardous to be permitted to continue to exist, and that a viaduct that will carry highway traffic over the tracks will provide a safe, adequate and convenient means of crossing"

and ordered a viaduct built to carry state highway traffic over the railroad tracks (R. 289, 290, 196). The viaduct was constructed in 1935 as ordered (R. 75, 76).

The public highway upon which the viaduct was built was originally opened in 1870 as a county road 100 feet wide upon a petition to the county court by the landowners in the community (R. 277-283, 154, 155) and was still 100 feet wide at the time of the trial (R. 52). The Petitioner has a frontage of 1100 feet on this highway, sometimes called Page Avenue or Boulevard. The viaduct was constructed in front of only the east 446½ or 475 feet of this 1100-foot frontage, and leaves 653½ or 625 feet of Petitioner's frontage west of the viaduct (R. 184, 181, 42).

The viaduct does not occupy the full width of the highway even for this distance of some 450 feet. Of the 100-foot highway, the roadway of the viaduct occupies only 42 feet in the clear in the middle of the highway. Between the viaduct and the right-of-way or property lines there is left approximately 25 feet of highway on each side of the viaduct for use at the old level of the road. In this 25

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[5]Section 5627 R. S. Mo. 1939 provides: "The (Public Service) Commission shall have the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, apportionment of expenses, use and protection of * * * each crossing of a public road or highway by a railroad * * * and to alter or abolish any such crossing, and to require, where, in its judgment, it would be practical, a separation of grades at any such crossing heretofore or hereafter established." *Chicago, R. I. & P. Ry. Co. v. State Highway Commission of Missouri*, 322 Mo. 419, 17 S. W. (2d) 535 (1929); *State ex rel. Kansas City Terminal Ry. Co. v. Public Service Commission*, 308 Mo. 359, 378, 272 S. W. 957 (en banc 1925); *City of Kirksville v. Hines*, 285 Mo. 233, 239, 225 S. W. 950 (1920); *State ex rel. Wabash Ry. Co. v. Public Service Commission*, 306 Mo. 149, 175, 267 S. W. 102 (1924).

feet on each side (starting at the property lines and going toward the viaduct) is a 5-foot sidewalk, a 2-foot grass plot, a 15-foot paved roadway and a 2-foot walkway (R. 65, 66). Besides the paved driveways at the old road level between the viaduct and the property lines, there are also paved driveways underneath the viaduct so that vehicles can go from one side of the road to the other at the old level between the abutments which support the viaduct. There were 4 entrances from Petitioner's lumberyard into the highway. Since the construction of the viaduct, Petitioner still has these same 4 entrances. The most westerly one of these is west of the viaduct. The other 3 enter that portion of the highway in the middle of which the viaduct is constructed. At the time of the construction of the viaduct, the curb next to Petitioner's property was opened up and entrances paved up to the property line at each of the old entrances. Each of the new entrances there is now "more of a flare or wider than it was before the viaduct was built" (R. 66, 67, 60, 63, 34).

The Petitioner claimed at the trial that the construction of the viaduct depreciated the value of its property $100,000 (R. 74, 87). The jury returned a verdict of $42,500 (R. 13). The trial court granted a new trial on the ground that it should have sustained a demurrer to the evidence (R. 272, 269). The Supreme Court of Missouri sustained the action of the trial court in granting the new trial.

There are no statutes in Missouri providing for payment of compensation to abutting landowners for change of grade outside municipal corporations, and the opinion of the Missouri court in our case holds there is no recovery in the absence of statute. There are statutes applying to cities of the various classifications providing for payment of compensation for change of grade inside municipalities (R. 296). The Petitioner contends that this is an unreasonable discrimination in contravention of the "equal protection" clause of the Fourteenth Amendment of the United States Constitution.

SUMMARY OF ARGUMENT.

There can be no federal question before this Court as to whether the State of Missouri has waived its immunity to suit for damages by a citizen under the provisions in the road law that the State Highway Commission of Missouri may "sue and be sued", or by the provision of Article II, Section 21, of the Missouri Constitution "that private property shall not be taken or damaged for public use without just compensation." This is a question of local State law, as to which the decision of the State Supreme Court is controlling. There can be no denial by the State of Missouri to any person within its jurisdiction of the "equal protection of the laws" if the State refuses, as to all alike, to waive immunity to suit for damages against itself or against the Respondent, which is the "subordinate branch of the executive department" of the State of Missouri.

There can be no federal jurisdiction in this Court to, and it should not, determine that Article II, Section 21 of the Missouri Constitution created new rights, duties and obligations in substantive law (as contrasted with remedies in adjective law), or to construe the Missouri Constitution as purporting to create private property or legal rights where none existed before, so as to make it possible to "take" or "damage" what had not previously existed. It is for the State court in cases such as this to define rights in land located within the State. The "or damaged" provision in the Missouri Constitution created no new substantive rights, duties and obligations. Such substantive rights, duties, or property would have to be created by statute or have already existed in common law before they could be "damaged." Missouri has created such substantive rights by statutes and city charters in, but only in, municipal corporations.

Even if Missouri courts had departed from some former well established rule of law (which they have not) holding that the "or damaged" phrase, added to the Missouri Constitution in 1875, created new kinds of private property and legal rights in substantive law, still this would not be a

violation of the Fourteenth Amendment of the United States Constitution. Petitioner would have no property right to have such former interpretation of the Missouri law continued.

The decision of the Missouri court is final and conclusive, even against the federal courts, as to what are, or are not, substantive property rights within the boundaries of the State of Missouri. There is no appeal from its decision that an abutting landowner outside of a municipal corporation has no easement in the highway—has no property or legal right—to have it maintained at its existing grade and that any damage consequent upon a change of grade is not a legal injury, but is *damnum absque injuria.*

There can be no violation of the "due process" clause of the Fourteenth Amendment of the United States Constitution, since it would be impossible for the State of Missouri to have deprived any person of property (which the State court has held does not exist) without due process of law.

There is no violation of the "equal protection" clause of the Fourteenth Amendment of the United States Constitution if discrimination between persons or territories is based upon classifications which are not necessarily, actually and palpably unreasonable and arbitrary, or have no fair and substantial relation to the object of the legislation. That classifications are unreasonable and arbitrary is never presumed. All doubts should be resolved in favor of, and not against, legislation. The burden of proving unreasonableness and arbitrariness is on the Petitioner.

The federal courts do not have as great familiarity with local conditions and needs as does either the State court or the State Legislature and, therefore, should be, and is, reluctant to overthrow the judgment of a State court that a classification has a fair and substantial relation to the object of the legislation. Once it is determined that a difference exists between territories or persons in the different classes, then it is exclusively a legislative function to determine the proper rules for the classification, and the judicial branch of the government has no right to set up its judgment as superior to that of the legislative branch.

This Court can easily and reasonably conceive of a state of local facts which may exist in Missouri as to differences between property inside and outside municipal corporations and which would have a fair and substantial relation to whether or not easements should be granted to abutting property owners to have an existing grade maintained. The Missouri Legislature, understanding and correctly appreciating the needs of its people, will be presumed to have drawn the classification between land in and land outside of municipalities because of local problems and conditions in Missouri, made manifest by experience, so that its discrimination is based upon adequate grounds.

RELEVANT PARTS OF THE CONSTITUTION.

The relevant parts of the *Fourteenth Amendment of the United States Constitution* are:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction an equal protection of the laws."

The relevant parts of Article II, Section 21 of the *Missouri Constitution* are:

> "That private property shall not be taken or damaged for public use without just compensation."

ARGUMENT.

This Court does not have general review jurisdiction of all matters of law which were before the trial court. This Court will review the action of the trial court or of the Supreme Court of Missouri only as to **federal** questions* which may be involved in the case. By bearing this in mind, we can eliminate many issues which the Petitioner seems to raise.

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*The ground for appeal is that some title, right, privilege, or immunity is claimed under the United States Constitution, Title 28, U. S. C. A. § 344, (b).

There can be no federal question before this Court as to whether the State of Missouri has waived immunity to suit for damages by a citizen under the provisions in the road law that the State Highway Commission of Missouri may "sue and be sued"† or by the provision of Art. II, Sec. 21 of the Missouri Constitution "that private property shall not be taken or damaged for public use without just compensation."

It has never been doubted since the days of Federalist Papers and the debates in Virginia and the other colonies over the adoption of the Constitution of the United States that a citizen cannot sue the State (without its consent) to recover money. Only the State's conscience can compel it to hear the petitions of its citizens for compensation. There is no provision in the Constitution of the United States for the enforcement of a money judgment against a State (war being the only way).[1] In *Palmer v. State of Ohio*, 248 U. S. 32, 34, 63 L. Ed. 108, 39 S. Ct. 16 (1918), "the plaintiff in error sued the State of Ohio for damages for flooding lands by elevated spillways of a state-maintained dam. The Supreme Court of the State affirmed the action of the lower court in dismissing the petition on the ground that the State had not consented to be sued." This Court said, l. c. 34:

> "The right of individuals to sue a state, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. (Citing cases). Whether Ohio gave the required consent must be determined by the construction to be given to the constitutional amendment quoted, and this is a question of local state law, as to which the decision of the state supreme court is controlling with this court, no federal right being involved."

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†Sec. 8750, R. S. Mo. 1939.

[1]*Hans v. Louisiana*, 134 U. S. 1, 13-15, 33 L. Ed. 842, 10 S. Ct. 504 (1889); *Ex Parte State of N. Y.*, 256 U. S. 490, 497, 65 L. Ed. 1057, 41 S. Ct. 588 (1921); *Monoco v. Mississippi*, 292 U. S. 313, 78 L. Ed. 1282, 54 S. Ct. 745 (1934).

There can be no denial by the State of Missouri to any person within its jurisdiction of the equal protection of the laws if the State refuses, **as to all alike,** to waive immunity to suit for damages against itself or against the State Highway Commission of Missouri, the "subordinate branch of the executive department" of the State of Missouri.[2] Whether or not the State has waived immunity to suit by provisions that the State Highway Commission "may sue and be sued"[3] or by the provisions in the Missouri Constitution "that private property shall not be taken or damaged for public use without just compensation"[4] is (in the language of the *Palmer* case) "a question of local state law, as to which the decision of the State Supreme Court is controlling with this court."

> **There can be no federal jurisdiction in this Court to, and it should not, determine that Article II, Section 21 of the Missouri Constitution created new rights, duties and obligations in substantive law (as contrasted with remedies in adjective law) or to construe the Missouri Constitution as purporting to create private property or legal rights where none existed before, so as to make it possible to "take" or "damage" what had not previously existed.**

The opinion of the Supreme Court of Missouri in this case holds (R. 299):

> "If plaintiff has sustained damages by the building of the viaduct, such damages are *damnum absque injuria*, 1 C. J. 964, Sec. 57; 1 C. J. S. (b) 1006, Sec. 15."

Laws fall into two general classifications: (1) the **substantive law,** or, as *Bouvier* says in his law dictionary, "the positive law of duties and rights," and (2) the **adjective law**—or the law of remedies and procedure. It will help us to understand what the Supreme Court of

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[2]See. p. 2, supra.
[3]Section 8750, R. S. Mo. 1939.
[4]Mo. Const., Art. II, Sec. 21, as amended in 1875.

Missouri meant to hold by referring to the citations in the opinion, where we find under *Actions*, 1 C. J. 964, Sec. 57:

> "To constitute an injury there must be a violation of some **legal** right, and there are many cases in which a person may sustain actual damage without sustaining any **legal** injury. In such cases the damage is *damnum absque injuria*—damage without injury, and no cause of action arises in favor of the party sustaining it against the party by whose act it was caused. But no damage for which a recovery is expressly authorized by statute can be deemed *damnum absque injuria*." (Emphasis ours.)

Again, we find under *Actions*, 1 C. J. S. 1006, Sec. 15, b, (1):

> "Since, as noted above in Section 15a, to sustain a cause of action there must be a legal injury, a violation of some legal right, if, as may happen in many cases, a person sustains actual damage, that is, harm or loss to his person or property, without sustaining any legal injury, that is, an act or omission which the law does not deem an injury, the damage is regarded as *damnum absque injuria*, damage without injury."

Petitioner cites (P. B. 14) *City of Chicago v. Taylor*, 125 U. S. 161, 166-168, 31 L. Ed. 638. But in that case this Court considered itself bound by, and simply followed, the State Court's interpretation of the State Constitution as laid down in *Rigney v. City of Chicago*, 102 Ill. 64, 74, 80, and in *Chicago & W. I. R. R. Co. v. Ayres*, 106 Ill., 511, 518.[5]

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[5]See *Fox River Paper Co. v. R. R. Com. of Wisconsin, and Sauer v. N. Y.*, 16, *post*. The Illinois court held in 1915 in *C. Hacker Co. v. City of Joliet*, 196 Ill. A. 415, 426 (cited under *Actions*, 1 C. J. S., *supra*.) that damages suffered by abutting property because the railroad elevated its tracks, "rise solely and only from the legitimate and proper operation of the railroads on the right-of-way adjacent to appellant's premises. There is no physical interference with the *corpus* of appellant's property. Light and air may be appreciably obstructed by the raising of the embankment as it would have been by the erection of a building on the land had it been owned by a private owner, and there may be an increase in noise and dust and confusion as there might be from a legitimate business of a private owner on adjacent premises. There may be a decrease in market value of appellant's premises because of the use that the railroad company is making of its premises. All urban properties are subject to increase and decrease in market value because of uses legitimately made by other nearby owners of their land."

Petitioner cites (P. B. 14) *Householder v. The City of Kansas*, 83 Mo. 488 (1884) as holding that the addition of the words "or damaged" in 1875 to Article II, Section 21, *Missouri Constitution* created a cause of action for damages on account of change of grade in a street in a city, while prior to that date the State court had held the damages to be *damnum absque injuria*. That the *Householder* case did not intend to hold that the amendment of the Constitution created new rights, duties and obligations in substantive law or to create private property or legal rights which had not previously existed, follows from the fact that this same Supreme Court of Missouri at the same October term, 1884, denied a recovery of damages occasioned by the taking or washing away of crops and damaging of land by the fill and bridge of a railroad, constructed for public use, and which impounded surface water—holding (despite the amendment to the Constitution in 1875) that such taking and damaging was still *damnum absque injuria* in a State having the common law (rather than civil law) rule of substantive law that surface water is the common enemy, and that the owner of higher land has no natural easement to drain surface water on lower land.[6]

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[6] *Abbott v. The K. C. St. J. & C. B. R. R. Co.*, 83 Mo. 271. *Jones v. The St. L. I. M. & S. Ry. Co.*, 84 Mo. 151, 155 (1884), says the *Abbott* case "fully approved" the doctrine in *Clark's Adm'r v. H. & St. Jo. Ry. Co.*, 36 Mo. 202, 223 (1865) that "the injury done by such embankment in causing the water to overflow the land of the adjoining proprietors, must be considered as the natural consequence of what the corporation had acquired the lawful right to do by the condemnation of the land and the assessment of damages therefor, and such damages must be taken to have been included in the compensation assessed, or it was *damnum absque injuria*." See *Moss v. The St. L. I. M. & S. Ry. Co.*, 85 Mo. 86, 89 (1884) (holding that the right to affect surface water on abutting land by opening or closing fills under the railroad tracks "is of necessity, a continuous one; for the idea is not to be tolerated that the company, having bought and paid for a right, should be denied the fullest and freest exercise thereof"); *Peel v. City of Atlanta*, 85 Ga. 138, 140 (1890) (holding that the "or damaged" phrase in the Constitution simply prevents the public from shielding itself behind its immunity to suit, but did not create any new legal duties, liabilities or obligations); *McCoy v. Plumb Bayou, etc. Dist.*, 95 Ark. 345, 352 (1910), (holding that, despite the "or damaged" provision, "where no right has been violated, there is no injury for which the law affords compensation"); *Taylor v. Chicago M. & St. P. R. R. Co.*, 85 Wash. 592, 600-602 (1915), citing *Pa. R. Co. v. Marchant*, 119 Pa. 541, affirmed 153 U. S. 380, 14 S. Ct. 894, 38 L. Ed. 751, and holding that the "or damaged" phrase "does not change or lessen the force of the doctrine of *damnum absque injuria*"; *Bush v. State Highway Commission*, 329 Mo. 843, 46 S. W. (2d) 854 (1932); *Sigler v. Inter-River Drainage Dist.*, 311 Mo. 175, 198, 208, 279 S. W. 50 (1925); *Thompson v. Chicago, M. & St. P. Ry. Co.*, 137 Mo. A. 62, 68, 119 S. W. 509 (1909); *Gaus & Sons Mfg. Co. v. St. L. K. & N. Ry. Co.*, 113 Mo. 308, 314, 317-319; *Sauer v. City of New York*, 206 U. S. 536, 544, 545, 27 S. Ct. 686, 51 L. Ed. 1176 (1906) (Quoted in the opinion below, R. 297); *Tate v. State Highway Commission*, 226 Mo. A. 1216, 49 S. W. (2d) 282 (no

In the absence of statute, the dedication or condemnation of right-of-way for public highway purposes gives the public the right to do in the roadway whatever may be found necessary to properly serve the needs of highway traffic.[7]

In *Broadwell v. City of Kansas*, 75 Mo. 213, 216 (1881), the Missouri Court quoted with approval:

> " 'The courts, by numerous decisions in most of the states, have settled the law that municipal corporations, acting under the authority conferred by the legislature, to make and repair, or to grade, level and improve streets, if they keep within the limits of the street and do not trespass upon or invade private property, and exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner whose lands are not actually taken, trespassed upon or invaded, for consequential damages to his premises, **unless there is a provision in the charter of the corporation, or in some statute creating the liability.**' 2 *Dillon Munic. Corp.*, Sec. 990." (Emphasis ours.)

This same authority says:[8]

> "A statutory right to compensation for the change of a grade in a street is substantially a grant to the abutting owner of an easement in the street to have it maintained at its existing grade."

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recovery for taking land on which plaintiff is a tenant at will); *Union Elevator v. K. C. Belt R. R. Co.*, 135 Mo. 353, 36 S. W. 1071, (interference with the storing of freight cars on other railroad's switch tracks); *McCulloch Co. Electric Co-Op. v. Hall*, 131 S. W. (2d) 1019, (construction of a high powered transmission line on a highway in such proximity to a telephone line as to cause great damage); *Gamble v. Pettijohn*, 116 Mo. 375, 379, (tearing up, plowing, ditching and guttering in a dedicated street); *Scott v. City of Marshall*, 110 Mo. A. 178, 183, (cutting valuable trees in a street in front of plaintiff's property.)

[7]*Sauer v. City of N. Y.*, 206 U. S. 536, 544; *Julia Building Ass'n v. The Bell Telephone Co.*, 88 Mo. 258, 268, 274 (1885); *State ex rel. State Highway Commission v. Cox*, 336 Mo. 271, 281, 282, 77 S. W. (2d) 116, 220 (1934); *St. L. K. & N. W. Ry. Co. v. Clark*, 121 Mo. 167, 196-197, 25 S. W. 192 (1894); *Moss v. The St. L. I. M. & S. Ry. Co.*, 85 Mo. 86, 89 (1884).

[8]*Dillon on Munic. Corp.*, 5th Ed., p. 1820, Sec. 1152.

The opinion of the Supreme Court of Missouri in this case points out (R. 296) that "such statutes as mentioned by *Dillon* have long existed in Missouri" creating such easements against cities of various sizes and classes.

Offsetting or balancing against increased highway demands by the public within the right-of-way, with the passage of time, are the increased demands upon, and use of the highway by the abutting landowners, which, of course, increase or inflate their damages when such increased value from the highway is withdrawn or affected. Abutting landowners have no property or other fixed rights in traffic, potential customers, are the benefits which come and go with changing currents of public travel on a public highway. The State owes no duty to the Petitioner to either send public traffic past, or to stop traffic at, its door. If, after having increased traffic past Petitioner's door, it should be liable in damages for any act, which decreases the volume of such traffic or the percentage which stop, crushing burdens would be imposed upon the public treasury to pay for such unearned increments of value.[9]

This is illustrated in our case by Petitioner's claim that the little country mud road which the abutting owners opened through their farms in 1870 has, by 1935, created such an increment of value to lucky landowners abutting it that some decrease in advertising value, attractiveness to retail customers traveling the highway, and inconvenience to over length trucks in turning into the stream of traffic on the highway had decreased the value of 26 acres over $100,000—probably many times the total value of the 26

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[9]*Nelson v. State Highway Board*, 1 Atl. (2) 689, 118 A. L. R. 915 (Vt. 1938); *Sears v. Crocker*, 184 Mass. 586, 587 (1904); *Handlan v. McManus*, 42 Mo. A. 551, 556, 558 (1890), (no easement to lateral support of buildings and added weight on land by user); *McGrath v. City of St. Louis*, 215 Mo. 191, 210 (1908), (no more easement to lateral support of buildings against a public alley than against private land). A case on all fours with ours is *Grande v. Casson*, 50 Ariz. 397, 403, 72 P. (2d) 676 (1937), where it says that in a previous case (*In Re Forsstrom*) "we also held that, in the absence of a statute to the contrary, after a street had once been established, the public authorities had a right to change the grade without paying additional compensation to a property owner for an invasion of his right of access through the subsequent regrading." In that case the change of grade was in front of lots abutting on 16th Street Extension to the City of Douglas, Arizona, but outside of the corporate limits.

acres in 1870. It seems that in 65 years the tail has grown large enough to wag the dog.

Even if the Missouri courts had departed from a former well-established rule of law (which they have not) holding that the "or damaged" phrase added to the Missouri Constitution created new kinds of private property and legal rights in substantive law, still this would not be a violation of the Fourteenth Amendment of the United States Constitution. Petitioner would have no property right in such former interpretations of the Missouri law.

In *Patterson v. Colorado*, 205 U. S. 454, 461, 51 L. Ed. 897, 27 S. Ct. 556 (1907), this court said:

> "There is no constitutional right to have all general propositions of law once adopted remain unchanged. Even if it be true, as the plaintiff in error says, that the Supreme Court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. * * * But in general the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed."

Again in *Brinkerhoff-Faris Trust and Savings Company v. Hill*, 281 U. S. 673, 680, 681, 50 S. Ct. 451, 74 L. Ed. 1107 (1930), where the Supreme Court of Missouri had said that it was "preposterous" and "unthinkable" that the Missouri Tax Commission had power to hear a matter and that any statute attempting to confer such power would be contrary to the Missouri Constitution (l. c. 676) yet six years later had denied the plaintiff injunctive relief on the ground that it had an adequate remedy through a hearing of the matter before the Tax Commission, this Court said that, while there was a denial of due process

because there had never been a time under the Missouri procedure when plaintiff could have had a hearing, yet

> "It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court. * * * Undoubtedly, the state court has the power to construe the statute dealing with the State Tax Commission; and to reexamine and overrule the *Laclede* case. Neither of these matters raises a federal question; neither is subject to our review."[10]

When the court of last resort in Missouri, whose judgment is final and conclusive, even against the federal courts, as to what are, or are not, substantive property rights within the boundaries of the State, holds that an abutting landowner outside of a municipal corporation has no easement in the highway—has no property or legal right—to have it maintained at its existing grade and that any damage consequent upon a change of grade is not a legal injury but is *damnum absque injuria*, there can be no violation of the "due process" clause of the Fourteenth Amendment of the United States Constitution, since it would then be impossible for the State to have deprived any person of property (which the court has held does not exist) without due process of law.

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[10]See to this same effect *Tidal Oil Co. v. Flanigan*, 263 U. S. 444, 450, 68 L. Ed. 382, 44 S. Ct. 197 (1923); and *Fleming v. Fleming*, 264 U. S. 29, 31, 68 L. Ed. 528, 44 S. Ct. 179 (1924).

To the above effect is *Fox River Paper Co. v. R. R. Commission of Wisconsin*, 274 U. S. 651, 654, 657, 47 S. Ct. 669, 71 L. Ed. 1279 (1927), where this court said:

> "We are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine. *Sauer v. N. Y., supra.* It is for the state court, in cases such as this to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent."

In the *Sauer* case[1] there was no statute called to the court's attention which would create any legal right o duty which had not existed at common law. This cour said:

> "But, as has been said, we are not concerne primarily with the correctness of the rule adopted b the Court of Appeals of New York and its conformit with authority. This court does not hold the relatio to the controversy between these parties which th Court of Appeals of New York had. It was the dut of that court to ascertain, declare and apply the la of New York, and its determination of that law conclusive upon this court. * * *
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> "Has the plaintiff been deprived of his propert without due process of law? The viaduct did n invade the plaintiff's land. It was entirely outsi that land. But it is said that appurtenant to the lar there were easements of access, light and air, and th the construction and operation of the viaduct impair these easements to such an extent as to constitute taking of them. The only question which need he be decided is whether the plaintiff had, as appurtena

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[1]*Sauer v. City of N. Y.*, 206 U. S. 536, 542, 545, 547, 51 L. Ed. 1176, 27 S. 686 (1906).

to his land, easements of the kind described; in other words, whether the property which the plaintiff alleged was taken existed at all. The court below has decided that the plaintiff had no such easements; in other words, that there was no property taken. It is clear that, under the law of New York, an owner of land abutting on the street has easements of access, light and air as against the erection of an elevated roadway by or for a private corporation for its own exclusive purposes, but that he has no such easements as against the public use of the streets or any structures which may be erected upon the street to subserve and promote that public use. The same law which declares the easements defines, qualifies and limits them. Surely such questions must be for the final determination of the state court. It has authority to declare that the abutting landowner has no easement of any kind over the abutting street; it may determine that he has a limited easement; or it may determine that he has an absolute and unqualified easement."

There is no violation of the "equal protection" clause of the Fourteenth Amendment of the United States Constitution if discrimination between persons or territories is based upon classifications which are not necessarily, actually and palpably unreasonable and arbitrary or have no fair and substantial relation to the object of the legislation.

It was long ago decided that the guarantee of equal protection of the laws does not require territorial uniformity.[2]

This court in *Mallett v. North Carolina*, 181 U. S. 589, 598, 45 L. Ed. 1015, 21 S. Ct. 730 (1901), quoted with approval from *Missouri v. Lewis*, 101 U. S. 22, 31, 25 L. Ed. 589 (1879), as to the "equal protection" clause:

"It means that no person or class of persons shall be denied the same protection of the laws which is

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[2]*Ocampo v. U. S.*, 234 U. S. 91, 98, 58 L. Ed. 1231, 34 S. Ct. 712 (1914); *Hays v. Missouri*, 120 U. S. 68, 71-72, 30 L. Ed. 578, 7 S. Ct. 350, (1886).

enjoyed by other persons or other classes in the same place and under like circumstances. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. * * * If diversities of laws and of judicial proceedings may exist in the several States without violating the equality clause of the Fourteenth Amendment, there is no solid reason why there may not be such diversity in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision."

That classifications are unreasonable and arbitrary is never presumed. All doubts are resolved in favor of, and not against, legislation. The burden of proving unreasonableness and arbitrariness is on the Petitioner.

Hughes, C. J., said for this Court in *Corporation Commission of Oklahoma v. Lowe*, 281 U. S. 431, 438, 74 L. Ed. 945, 50 S. Ct. 397, 399 (1930):

"It was encumbent upon the appellee in invoking the protection of the Fourteenth Amendment to show with convincing clarity that the law of the State created against him the discrimination of which he complained. An infraction of the constitutional provision is not to be assumed. On the contrary, it is to be presumed that the State in enforcing its local policies will conform its requirements to the Federal guarantees. Doubts on this point are to be resolved in favor of, and not against, the State."

In *Borden's Farm Products Corporation v. Baldwin*, 293 U. S. 194, 209, 79 L. Ed. 281, 55 S. Ct. 187, 192 (1934), this court said through Hughes, C. J.:

"When the classification made by the legislature is called in question, if any state of facts reasonably can

be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary."

In *Fort Smith Light & Traction Co. v. Board of Improvement*, 274 U. S. 387, 391, 392, 71 L. Ed. 1112, 47 S. Ct. 595 (1927), this Court said through Justice Stone:

"The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state. * * * Differences in location, use and physical character of streets, the extent to which paving has been completed and local methods of assessing benefits for street paving, or some of the considerations which might reasonably move the Legislature to require street paving of one (rail) road or several and not of others. * * * We may not assume in the absence of proof that such differences do not exist."

This court said in *New York Rapid Transit Corp. v. City of New York*, 303 U. S. 573, 578, 58 S. Ct. 721, 724, 82 L. Ed. 1024 (1938) through Justice Reed:

"No question is or could be made by the Corporation as to the right of a state, or a municipality with properly delegated powers, to enact laws or ordinances, based on reasonable classification of the objects of the legislation or of the persons whom it affects. 'Equal protection' does not prohibit this. Although the wide discretion as to classification retained by a legislature, often results in narrow distinctions, these distinctions, if reasonably related to the object of the legislation, are sufficient to justify the classification. * * * Indeed, it has long been the law under the 14th Amendment that 'a distinction in legislation is not arbitrary,

if any state of facts reasonably can be conceived that would sustain it' * * * 'The rule of equality permits many practical inequalities'."

The Federal Courts do not have as great familiarity with local conditions, customs and needs as does either the State Court or the State Legislature and therefore should be, and is, reluctant to overrule the judgment of a State Court that a classification has a fair and substantial relationship to the object of the legislation. Once it is determined that a difference exists between territories or persons in the different classes, then it is exclusively a legislative function to determine the proper rules for the classification and the Judicial Branch of the Government has no right to set up its judgment as superior to that of the Legislative.

In passing on a workmen's compensation law which contained close distinctions as to its applicability to different persons, this Court in *Ward & Gaw v. Krinsky*, 259 U. S. 503, 521, 522, 66 L. Ed. 1033, 42 S. Ct. 529, 28 A. L. R. 1207, 1217 (1922), approved

> "the wisdom of the familiar rule, expressed by this court in a recent case in these terms: 'There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds.' * * * What was it they were aiming at, and how did they seek to accomplish it? We need not be sure of hitting upon a correct, much less a complete, explanation. Upon the general presumption referred to the questioned group must stand, unless it were demonstrated to a moral certainty, beyond a reasonable doubt, that the grouping could not possibly be explained on reasonable grounds."[3]

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[3]See *Welch v. Swasey*, 214 U. S. 91, 105-108, 53 L. Ed. 923, 29 S. Ct. 567 (1909), (classification as to allowable heights of buildings in cities in Massachusetts); *Ohio ex rel. Clark v. Deckebach, Auditor*, 274 U. S. 392, 397, 71 L. Ed. 1115, 47 S. Ct. 630 (1927), (allowing pool hall licenses to be issued to citizens but not to aliens); *Erb. v.*

This Court can easily and reasonably conceive of a state of local facts which may exist in Missouri as to differences between property inside or outside municipal corporations, and which would have a fair and substantial relation to whether or not easements should be granted to abutting property owners to have an existing grade maintained. The Missouri Legislature, understanding and correctly appreciating the needs of its people, will be presumed to have drawn the classification between land in and land outside of municipalities because of local problems and conditions in Missouri made manifest by experience so that its discrimination is based upon adequate grounds.

The Missouri Court cites *Moxley v. Pike County*, 276 Mo. 449, 454, 208 S. W. 246, 247 (1918), in *Zoll v. County of St. Louis*, 343 Mo. 1031, 1039, 124 S. W. (2d) 1168 (1939), in connection with the proposition that:

> "Such a cause as here (a change of grade outside a municipal corporation) has never been permitted to be maintained in this State. The long established policy of the State, as reflected in the cases we have reviewed, and there are others, clearly is against the maintenance of such suits. Cases involving municipal corporations are not authority for the maintenance of the present cause, and this because when improving streets, etc., the municipality is acting in a private and proprietary capacity and for its own private benefit."

The *Moxley* case is again cited as authority for the opinion in our case (R. 298). The opinion in the *Moxley* case dealt with the question of whether agencies such as counties, townships and school districts have the same immunity from common law negligence that the State itself has, or whether they are subject to such liability (in the

Morash, 177 U. S. 584, 586, 587, 44 L. Ed. 897, 20 S. Ct. 819 (1900), (given the possibility of a difference in conditions along streets in Kansas City, Kansas, it was not for witnesses, juries or courts, but for the legislative power to determine what regulations should be applied and the propriety of limiting the speed of all trains of cars except the Interstate Rapid Transit Company's cars to 6 miles an hour, and in the absence of knowledge of local facts, the court was compelled to presume that the classification was reasonable.

instant case) as municipal corporations would be. The opinion says:

> "To make this question plain, we should look to the foundation of the distinction in the character of the two classes of public agencies which controls their liability. * * * In the organization of counties the legislative purpose is to divide the State into convenient districts for the purpose of administering the laws * * *. On the other hand, * * * the foundation of the distinction against municipal corporations is laid wide and deep in private interests which mark the first step in their creation. It consists, in this State, of filing a plat. Some proprietor, ambitious for the gains that come from a system of streets, alleys and other urban improvements which attend the creation of a city, lays it out according to his own idea, and trusts the future for that development which he hopes will immeasurably increase the value of every lot and plat of ground which it includes. Purchasers come who partake of his hope, and join him in a system of development of streets, public squares, and limited building districts, which are the principal elements of the expected profit. The State provides a plan by which the pride and ambitions of the inhabitants of the surrounding country may be utilized for the benefit of the urban corporations, (Chap. 102, Art. VI, R. S. 1909) and the fullest authority is given the corporation to control all improvements for the best interest of the inhabitants and other owners of urban property. These and other similar conditions affect the development of municipal corporations, and afford ample ground for the distinction which exists in this State between them and other governmental agencies with respect to their liability for the negligence of their officers and agents in the construction and maintenance of a class of improvements upon which their development and the peculiar value of their immovable property stands."[4]

[4]See *Municipal Corporations*, 43 C. J. 70, Sec. 6; p. 183, Sec. 180; *Municipal Corporations*, 19 R. C. L. 698, Sec. 9; p. 1111, Sec. 392; *Barree v. Cape Girardeau*, 19 Mo. 382, 388, 389 (1906); *Boothe v. Fulton*, 85 Mo. A. 16, 18-19.

The force of the distinction drawn in the *Moxley* case is evident to everyone. At the time when universal distinctions in the law were growing up between city streets and country roads, farmers and back woodsmen trudged the country mud roads in rough clothes and boots or rode in wagons. The barn for their stock was generally considered more important and was constructed more pretentiously than the farm house for the family. The relation between the grade of the yard in front of the farm house and the dirt surface of the road was considered of little importance and there would be little, if any, financial loss because of a change. On the other hand, one of the reasons for incorporating a municipal area was to secure the benefits of paved streets and sidewalks for fine ladies in silks and satins and fine gentlemen who rode in carriages. There one's place in the proper strata of society or among the "400" was supposed to be indicated, somewhat at least, by the location of his home in some restricted neighborhood, with landscaped grounds facing on an attractive street or boulevard, graded and parked. Grading, paving, and the many other conveniences which add to the pleasure of living in cities, and which are not ordinarily enjoyed outside of such incorporated areas, are generally paid for by special benefit assessments against the abutting land, on the theory that practically the only benefit from such improvement accrues to such land, and little, if any, to the general traveling public as in the country.

To promote and preserve the paramount private interest in the street, the Legislature authorized cities to establish paper grades, and to create easements in the abutting property to have those grades maintained or to recover damages if they were changed. That the establishment of a grade by a city was considered as a compact between the city and the abutting property owner, upon which the property owner might rely in making his future improvements, was indicated as early as 1821 in *Goszler v. Corporation of Georgetown*, 6 Wheat (19 U. S.) 593, 597.

In conclusion, Respondent respectfully submits: (1) that the only question before this Court is whether or not

it is a denial of the "equal protection of the laws" for the State of Missouri to adopt a local policy, and to enact statutes, providing for compensation to abutting landowners for change of street grades in municipal corporations, while enacting no statutes requiring compensation for change of grade outside of such corporations; (2) that the classification of abutting property in municipal corporations differently from property outside municipal corporations, as to the granting of an easement to have a grade maintained, is reasonable, and therefore, does not contravene the "equal protection" clause of the Fourteenth Amendment; (3) that the decisions of the Missouri courts are controlling as to (a) whether or not there has been a waiver of Respondent's immunity to suit, (b) as to whether or not the "or damaged" provision in the Missouri Constitution created new property rights, duties and obligations in substantive law, and (c) whether or not property rights, duties and obligations exist in Missouri at common law or by statute; (4) that no one can be deprived "without due process of law" of property which the State court has found to be non-existent; and (5) even if the Missouri courts had departed from former well-established rules as to the existence of a right to compensation for change of grade outside municipal corporations, still this would not be a violation of any provision in the United States Constitution.

Respectfully submitted,

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